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### REMARKS

Claims 1-20 remain in the application. Claims 1 and 8 have been amended to more specifically set forth the invention. Reconsideration is respectfully requested.

#### 35 U.S.C. § 102(b)

Claims 1-4, 8-10 and 14-17 are rejected under 35 U.S.C. § 102(b) as being anticipated by Attaway (U.S.P. 5,775,530). Applicant believes that the amendments now overcome this rejection.

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. V. Union Oil Co. of California*, 2 USPQ2d 1051, 1053, (Fed. Cir. 1987). Also, "All words in a claim must be considered in judging patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 165 USPQ 494, 496 (CCPA 1970).

Claim 1 now clearly specifies "the pouch being constructed to define an insulated and substantially water

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impermeable food warming chamber". Similarly, claim 8 now states "a substantially water impermeable plastic film pouch defining a food warming chamber". Thus, a food warming chamber is a specific element of these claims and must be present or inherent in Attaway for claims 1 and 8 to be anticipated. Attaway does not disclose or even suggest a food warming chamber. Since Attaway does not disclose or suggest a food warming chamber he cannot anticipate claims 1 and 8.

Further, claim 1 now states "a pouch including a layer formed of a film of plastic material to provide water impermeability" and claim 8 states "a substantially water impermeable plastic film pouch defining a food warming chamber". First it must be noted that the film of plastic provides water impermeability. Attaway does disclose nylon material on the inner and outer surfaces of his neoprene walls. However, nothing in his disclosure even remotely suggests that the nylon material makes the enclosure water impermeable. Nylon material comes in many forms (e.g. nylon stockings) many of which are not impermeable. In fact, nylon cloth generally must be treated to make it waterproof or impermeable to water. Since Attaway does not

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disclose or suggest "a substantially water impermeable plastic film pouch" he cannot anticipate claims 1 and 8.

Claim 1 now specifically states "the partial enclosure caused by the passive, non-sealing engagement between the lips and the food warming chamber being constructed to inhibit a build-up of moisture vapor produced from warm food disposed in the warming chamber for preventing warm food disposed in the warming chamber from becoming soggy and to allow enough moisture vapor to remain in the warming chamber for keeping warm food disposed in the warming chamber moist". Claim 8 specifies "the partial enclosure caused by the passive, non-sealing engagement between the lips and the food warming chamber being constructed to provide a partial vapor lock in the food warming chamber". Applicant does not believe that Attaway can provide this structure, since his case is specifically designed with "inside dimensions smaller than said fragile object" (Attaway, claim 1), which would hold the upper and lower portions rigidly in place. No one (except possibly Attaway) could possibly tell from the Attaway disclosure what would happen if warm food were placed in his case. Certainly, nothing suggests that a partial vapor lock would be created at the opening between his top and bottom

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portions. Thus, since Attaway does not disclose or suggest "a partial vapor lock" he cannot anticipate claims 1 and 8.

Claims 2-7 are dependent upon claim 1 and claims 9-13 are dependent upon claim 8. Each of these dependent claims is not anticipated by Attaway for the same reasons as specified with respect to claims 1 and 8.

Claim 14 specifies "a soft and flexible insulated pouch having a substantially water impermeable warming chamber". Attaway does disclose nylon material on the inner and outer surfaces of his neoprene walls. However, nothing in his disclosure even remotely suggests that the nylon material makes the enclosure water impermeable. Nylon material comes in many forms (e.g. nylon stockings) many of which are not impermeable. In fact, nylon cloth generally must be treated to make it waterproof or impermeable to water. Since Attaway does not disclose or suggest "a substantially water impermeable warming chamber" he cannot anticipate claim 14. Also, claims 15-20 are dependent upon claim 14 and are not anticipated by Attaway for the same reasons given above.

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Since it is well known that all nylon material is not water impermeable, any assumption that the nylon material of Attaway is water impermeable is not supported by the Attaway disclosure. Thus, such an assumption is taking judicial notice and applicant specifically traverses such judicial notice.

35 U.S.C. § 103

Claims 1-4, 8-10 and 14-17 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Attaway (U.S.P. 5,775,530) in view of either Stewart (U.S.P. 5,692,660) or Goryl (U.S.P. 5,967,390). Applicant believes that the above amendments overcome this rejection.

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patentability of that claim against the prior art." *In re*  
*Wilson*, 424 F.2d 1382, 165 USPQ 494, 496 (CCPA 1970).  
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Claim 1 now clearly specifies "the pouch being constructed to define an insulated and substantially water impermeable food warming chamber". Similarly, claim 8 now states "a substantially water impermeable plastic film

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pouch defining a food warming chamber". Thus, a food warming chamber is a specific element of these claims. Neither Attaway, Stewart, nor Goryl disclose or even suggest a food warming chamber.

In fact, applicant believes that all three patents, e.g. Attaway, Stewart, and Goryl, are non-analogous art. The Examiner must determine what is "analogous prior art" for the purpose of analyzing the obviousness of the subject matter at issue. "In order to rely on a reference as a basis for the rejection of an applicant's invention the reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problems with which the inventor was concerned." *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992).

Attaway discloses apparatus for protecting fragile objects. Stewart discloses a reversible article carrying bag. Goryl discloses an inflatable container for use by fishermen. Clearly these are all far from applicant's field of endeavor. Further, there is no reason why any of these disclosures would have logically commended themselves to anyone's attention when considering problems in the food

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warming art. Therefore, all three citations are clearly non-analogous art and should not be considered in determining obviousness.

claim 1 now states "a pouch including a layer formed of a film of plastic material to provide water impermeability" and claim 8 states "a substantially water impermeable plastic film pouch defining a food warming chamber". First it must be noted that the film of plastic provides water impermeability. Water impermeability is included to prevent the food that is being warmed or stored from drying out.

Attaway does disclose nylon material on the inner and outer surfaces of his neoprene walls. However, nothing in his disclosure even remotely suggests that the nylon material makes the enclosure water impermeable. Nylon material comes in many forms (e.g. nylon stockings) many of which are not impermeable. In fact, nylon cloth generally must be treated to make it waterproof or impermeable to water. Attaway is concerned with preventing the breakage of fragile objects, most of which suggested by Attaway are glass. It is noted that these fragile objects might include some metal but nowhere in the disclosure of Attaway

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does he mention any worry about rust. Nothing in this disclosure would lead one skilled in the food art to a film of plastic material to provide water impermeability in a food warming cavity.

Stewart discloses two interconnected bags, one of which is constructed of mesh and one of which is constructed of water-resistant material. "It will be appreciated, however, that the bags may be constructed from the same material." (Stewart specification, column 3, lines 45-46.) The bags can be water resistant or not, Stewart is unconcerned. Thus, Stewart does not teach anyone skilled in the art a need for impermeability. Nothing in this disclosure would lead one skilled in the food art to a film of plastic material to provide water impermeability in a food warming cavity.

Goryl discloses an inflatable container for use by fishermen. While he discloses a container that is certainly waterproof, the reason is to keep water out rather than to keep water in. Nothing in this disclosure would lead one skilled in the food art to a film of plastic material to provide water impermeability in a food warming cavity.



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The basic rules for determining obviousness were set down by the Supreme Court in *Graham v. John Deere*, 383 U.S. 1, 148 USPQ 459 (1966). The *Graham* factual inquiries, including (1) "determining the scope and contents of the prior art" and (2) "ascertaining the differences between the prior art and the claims in issue", are still part of Patent Law and should be applied. Thus, a primary fact to consider is the disclosures, individually, of the applied references, i.e., Attaway, Stewart, and Goryl, and what they would teach one skilled in the art. While the test, according to *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981), is what the combined teachings of the references would have suggested to those skilled in the art, it is still proper and instructive, according to *Graham*, to consider each of the references individually to determine the scope and content.

In determining the differences between the prior art and the claims, the question under 35 U.S.C. 103 is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious. *Stratoflex, Inc. v Aeroquip Corp.*, 713 F.2d 1530, 218 USPQ 871 (Fed. Cir. 1983); *Schenck v Nortron*

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*Corp.*, 713 F.2d 782, 218 USPQ 698 (Fed. Cir. 1983).

Further, a prior art reference must be considered in its entirety, i.e.. as a whole, including portions that would lead away from the claimed invention. *W. L. Gore & Associates, Inc. v Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

"All words in a claim must be considered in judging patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 165 USPQ 494. 496 (CCPA 1970).

Taking the claimed invention as a whole (claim 1, for example), apparatus for keeping food warm and moist is specified. The apparatus comprises: (1) a pouch including a layer formed of a film of plastic material to provide water impermeability, (2) the pouch being constructed to define an insulated and substantially water impermeable food warming chamber, (3) the pouch having opposing substantially coextensive lips formed to provide a passive, non-sealing engagement between the lips causing a partial enclosure of the warming chamber, (4) the partial enclosure and the food warming chamber being constructed to inhibit a build-up of moisture vapor produced from warm food disposed in the warming chamber and to allow enough moisture vapor to remain in the warming chamber for keeping warm food

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disposed in the warming chamber moist.

Note that all four of the items specified are structure and not function. Elements (1) and (2) have been discussed above. Elements (3) and (4) are constructed and cooperate "to inhibit a build-up of moisture vapor produced from warm food disposed in the warming chamber" and "to allow enough moisture vapor to remain in the warming chamber for keeping warm food disposed in the warming chamber moist". Nothing in the teachings of Attaway, Stewart, or Goryl suggest a warming chamber with lips that allow some moisture to escape but retain some moisture from warm food. In fact the protection device of Attaway is formed to grip the protected object and would not react to any warm food placed in it. That is, once pulled into a protective orientation, there is no teaching or suggestion that the upper and lower portions might separate enough to allow moisture to escape from within. The bags of Stewart are designed to be permanently closed by draw strings. The inflatable box of Goryl might not even have a cover in some embodiments. Thus, no combination of these references would produce the claimed structure since none of the references are constructed to operate in a similar fashion.

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Claim 8 calls for "insulating structure supporting and substantially engulfing a substantially water impermeable plastic film pouch defining a food warming chamber". While Attaway discloses a layer of neoprene material with nylon on both surfaces, the nylon is not necessarily impermeable and the neoprene is provided only for protection. Neither Stewart nor Goryl disclose an insulating structure. Stewart discloses a water resistant sack for some embodiments but provides no guidance as to whether it should be mesh or water resistant. Goryl discloses an inflatable box.

Claim 8 also calls for the partial enclosure caused by the passive, non-sealing engagement between the lips and the food warming chamber being constructed to provide a partial vapor lock in the food warming chamber. Nothing in the teachings of Attaway, Stewart, or Goryl suggest a food warming chamber or a food warming chamber with lips that cooperate to provide a partial vapor lock in the food warming chamber. In fact the protection device of Attaway is formed to grip the device and would not react to any warm food placed in it. The bags of Stewart are designed to be permanently closed by draw strings. The inflatable box of Goryl might not even have a cover in some

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embodiments. Thus, no combination of these references would produce the claimed structure since none of the references are constructed to operate in a similar fashion.

To establish the *prima facie* case of obviousness, which the Examiner must establish, the first basic criteria that must be met is to show some suggestion or motivation to modify the references or to combine reference teachings to arrive at applicant's claimed method. No suggestion or motivation to cure the problem solved by applicant's invention is included anywhere in any of Attaway, Stewart, or Goryl. Further, the references when combined must teach or suggest all of the claim limitations. Again, there is no suggestion or motivation to combine the teachings of Attaway, Stewart, or Goryl to result in the claimed invention. As discussed at length above, any proper combination of Attaway, Stewart, or Goryl do not meet these criteria and will not result in the claimed invention. Applicant believes that claims 1 and 8 of the present application are not obvious in view of any proper combination of Attaway, Stewart, or Goryl. Thus applicant believes that claims 1-4, 8-10 and 14-17 are allowable over the cited references.

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Claims 5-7, 11-13, and 18-20 stand rejected under 35 U.S.C. § 103 as being unpatentable over Attaway (U.S.P. 5,775,530) in view of either Stewart (U.S.P. 5,692,660) or Goryl (U.S.P. 5,967,390) and further in view of Anderson et al. (U.S.P. 4,919,300). Applicant believes that the above amendments overcome this rejection.

Claims 5-7 are dependent upon claim 1, claims 11-13 are dependent upon claim 8, and claims 18-20 are dependent upon claim 14. For all of the reasons given above, these dependent claims are allowable over the cited art.

In addition to the previously described and discussed prior art, the Examiner has included Anderson et al. As explained in detail above, Anderson et al. is non-analogous art that pertains to shipping containers. Clearly this disclosure is far from applicant's field of endeavor. Further, there is no reason why this disclosure would have logically commended itself to anyone's attention when considering problems in the food warming art. Therefore, this citation is clearly non-analogous art and should not be considered in determining obviousness.

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To establish the *prima facie* case of obviousness, which the Examiner must establish, the first basic criteria that must be met is to show some suggestion or motivation to modify the references or to combine reference teachings to arrive at applicant's claimed method. No suggestion or motivation to cure the problem solved by applicant's invention is included anywhere in any of Attaway, Stewart, Goryl, or Anderson et al. Further, the references when combined must teach or suggest all of the claim limitations. Again, there is no suggestion or motivation to combine the teachings of Attaway, Stewart, Goryl, or Anderson et al. to result in the claimed invention.

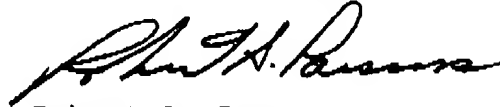
Therefore, applicant believes that claims 5-7, 11-13, and 18-20 are not obvious in view of any proper combination of Attaway, Stewart, Goryl, or Anderson et al.

In view of the foregoing, applicant believes that all of the claims presently pending in this case are in condition for allowance, which action is earnestly solicited.

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Examiner's thorough and thoughtful consideration of this application is sincerely appreciated. Should there be any remaining issues, Examiner is cordially invited to telephone the undersigned for a speedy resolution.

Respectfully submitted,



Robert A. Parsons  
Attorney for Applicant  
Reg. No. 32,713

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340 East Palm Lane  
Suite 260  
Phoenix, Arizona 85004  
(602) 252-7494